

## THE ADMINISTRATIVE COURT: VARIATIONS ON A THEME

ROBERT W. MINOR\*

The idea of an administrative court of special jurisdiction has been a recurrent phenomenon in the continuing effort, throughout the seventy year history of administrative law, to separate the powers and functions of administrative agencies. Aversion to the concept of a regulatory agency—delegated powers and functions with little apparent regard for the traditional doctrine of separation of governmental powers—highlighted the congressional debates on the act establishing the Interstate Commerce Commission in 1887,<sup>1</sup> just as it is the cornerstone of the current drive for what its proponents call the “judicialization of the administrative process.”<sup>2</sup> The administrative court has not always been the particular device proposed to accomplish this so-called judicialization, but the separation of agency functions and powers has remained the constant ultimate objective.<sup>3</sup> Nor has the fact that the separation of powers argument lacked persuasiveness to the members of the 49th Congress and many succeeding Congresses diminished the enthusiasm with which it has been invoked in support of the recurrent proposals to establish an administrative court or courts.<sup>4</sup>

The present proposals for specialized administrative courts pending

---

\* Commissioner, Interstate Commerce Commission

<sup>1</sup> 24 STAT. 379 (1887).

<sup>2</sup> REPORT OF THE TASK FORCE ON LEGAL SERVICES AND PROCEDURES OF THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT 242 (March 1955).

<sup>3</sup> “From the time of the debates on the Interstate Commerce Act in 1886 to the latest newspaper blast against the NLRB there has been no let-up in the attack on the independent commissions because of this merger of powers.” CUSHMAN, *THE INDEPENDENT REGULATORY AGENCIES* 12 (1941).

<sup>4</sup> LEGAL SERVICES AND PROCEDURE, REPORT TO THE CONGRESS BY THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT 84 (March 1955): “The development of the administrative process has led to a substantial modification of the traditional doctrine of the separation of powers. In special areas of regulation, executive, legislative and judicial powers have been combined in a single instrumentality, but such a commingling of functions is justified only where the Congress finds that it is necessary to the effective performance of the regulatory responsibilities of the Federal Government. Our task force believes that wherever practicable there should be a complete separation of the judicial functions of administrative agencies from their other functions.”; TASK FORCE REPORT, *op. cit. supra* note 2, 33-35, 239-256; REPORT OF THE SPECIAL COMMITTEE ON LEGAL SERVICES AND PROCEDURE OF THE AMERICAN BAR ASSOCIATION TO THE 1956 MIDYEAR MEETING OF THE HOUSE OF DELEGATES 42, 43 (1956). See also Caldwell, *The Proposed Federal Administrative Court: Argument For its Adoption*, 36 A.B.A.J. 13, 15 (1950): “The root of the evil is, to my mind, the mistake we made many years ago in departing from the majestic simplicity of the original architecture of our government, and particularly in excessive trifling with one of its cornerstones, the separation of powers doctrine.”

in Congress<sup>5</sup> and under consideration by the organized bar,<sup>6</sup> while variations on an old theme, are more remarkable than similar past proposals, not for their novelty, but for their specificity and for the number and stature of their proponents.<sup>7</sup> These present proposals have their immediate origin in the report of the Task Force on Legal Services and Procedures of the second Hoover Commission.<sup>8</sup> The Task Force recommended two steps to accomplish the separation of judicial functions from administrative agencies. First, it recommended the transfer to courts of general jurisdiction of "judicial functions of administrative agencies, of the kind ordinarily performed by courts and which require the assistance of courts for effective enforcement. . . ."<sup>9</sup> As examples of this category of judicial functions, the Task Force cited "the imposition of money penalties, the remission or compromise of money penalties, the award of reparation and damages, and the issuance of injunctive orders."<sup>10</sup> Second, the Task Force recommended the establishment of an Administrative Court, as a trial court of special jurisdiction within the established judicial structure of the United States, with limited jurisdiction in the fields of trade regulation and taxation.<sup>11</sup> Jurisdiction in the field of

---

<sup>5</sup> S. 2292, 85th Cong., 1st Sess. (1957).

<sup>6</sup> REPORT OF THE SPECIAL COMMITTEE, *op. cit. supra* note 4, at 42-46.

<sup>7</sup> The members of the Commission on Organization of the Executive Branch of the Government were Herbert Hoover, Chairman; Herbert Brownell, Jr., James A. Farley, Arthur S. Flemming, Homer Ferguson, John L. McClellan, Robert G. Storey, Clarence J. Brown, Chet Holifield, Joseph P. Kennedy, Sidney A. Mitchell, and Solomon C. Hollister. Members Brown and Farley reserved judgment on certain aspects of the Administrative Court proposals; Member Holifield opposed the establishment of an Administrative Court.

The members of the Task Force of the second Hoover Commission were James Marsh Douglas, Chairman; Herbert Watson Clark, Cody Fowler, Albert J. Harno, James McCauley Landis, Carl McFarland, Ross L. Malone, Jr., David F. Maxwell, Harold R. Medina, David W. Peck, Reginald Heber Smith, E. Blythe Stason, Elbert Parr Tuttle, and Edward Ledwidge Wright. Special consultants to the Task Force were Robert H. Jackson, George Roberts, and Arthur T. Vanderbilt.

The members of the Special Committee of the American Bar Association included Ashley Sellers, Chairman; Donald C. Beelar, Robert M. Benjamin, Milton J. Blake, Ralph G. Boyd, Richard S. Doyle, Harry Gershenson, C. Baxter Jones, Jr., Rufus C. Poole, Gerard D. Reilly, Bernard G. Segal, Thomas N. Tarleau, and Glenn R. Winters.

<sup>8</sup> TASK FORCE REPORT, *op. cit. supra* note 2.

<sup>9</sup> *Id.* Recommendation No. 62, at 242.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Id.* at 246-256. Recommendations Nos. 63, 64 and 65: "The task force does not propose to establish an Administrative Court of general jurisdiction to review or to try all types of cases for administrative agencies and Executive tribunals, but only to confer special jurisdiction upon an Administrative Court to hear and determine cases within limited and clearly defined areas. The granting of general jurisdiction to such a Court, even if only concurrent, might interfere with the effective administration of many regulatory functions.

"In addition to performing judicial functions within these areas of defined

taxation would be coincident with that now vested in the present Tax Court of the United States, which, under these recommendations, would become the Tax Section of the new administrative court. The Trade Section of the administrative court would be a more drastic departure from the presently established structure. The jurisdiction of the Trade Section would be compiled from the powers now vested under the Clayton Act and other statutes similarly enforced,<sup>12</sup> in the Federal Trade Commission, the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Federal Reserve Board, United States Tariff Commission, the Federal Power Commission, the Department of the Interior, and the Department of Agriculture.

Section 11 of the Clayton Act presently delegates to the agency with basic regulatory jurisdiction the administration and enforcement of the various provisions of the act applicable to the appropriate regulated industry. Under the Task Force proposal, exclusive jurisdiction in these trade practice matters would be vested in the Trade Section of the court. The role of the regulatory agency now exercising this jurisdiction would be limited to the filing and prosecution of complaints before the Trade Section of the proposed Administrative Court.<sup>13</sup>

The recommendations of the Hoover Commission itself<sup>14</sup> do not fully accord with the recommendations of its Task Force. Regarding the transfer of judicial functions to existing courts, the Commission recommended that "Congress should look into the feasibility of transferring to the courts certain judicial functions of administrative agencies," listing the same examples suggested by the Task Force.<sup>15</sup> The Task Force recommendation for the establishment of an Administrative Court was expanded from two sections to three by the addition of a Labor

---

jurisdiction, however, the Administrative Court will provide an instrumentality to which, from time to time in the future, additional adjudicatory functions in special areas might be transferred."

<sup>12</sup> 38 STAT. 719, 734 (1914), 15 U.S.C. §21, 45 (1952); 52 STAT. 1003 (1938), 49 U.S.C. §491 (1952); 46 STAT. 703 (1930), 19 U.S.C. §1337(c) (1952); 49 STAT. 861 (1935), 16 U.S.C. §825(m) (1952); 48 STAT. 1086 (1934), 47 U.S.C. §312(b) (1952); 48 STAT. 1214 (1934), 15 U.S.C. §522 (1952); 42 STAT. 161 (1921), 7 U.S.C. §193 (1952); 42 STAT. 388 (1922), 7 U.S.C. §292 (1952).

<sup>13</sup> This limited function would be still further limited under §112(a) of S. 2292, the Smith bill: "In any proceeding before the Administrative Court, . . . the United States shall be represented either by the chief legal officer of the agency which initiated the proceeding, *if his appointment was made pursuant to specific statutory authority therefor*, or by the Attorney General." (Emphasis supplied). The italicized language would deny representation to the Interstate Commerce Commission, the Federal Trade Commission and other regulatory agencies.

<sup>14</sup> COMMISSION REPORT, *op. cit. supra* note 2.

<sup>15</sup> This qualification apparently does not extend to the transferral of jurisdiction to award reparations. The Hoover Commission stated: "We feel that the Interstate Commerce Commission . . . should be divested of authority to enter orders for reparations . . ." COMMISSION REPORT, *op. cit. supra* note 2, at 85.

Section, exercising the adjudicatory jurisdiction now vested in the National Labor Relations Board.<sup>16</sup> Further, the Commission qualified its Administrative Court recommendation by suggesting that Congress study and determine whether the Trade Section and the Labor Section should have original or appellate jurisdiction.<sup>17</sup> No such doubt plagued the Task Force. It specifically rejected the concept of a specialized appellate court.<sup>18</sup>

On February 20, 1956, the House of Delegates of the American Bar Association adopted a resolution expressing to Congress that body's support of the Hoover Commission recommendation with respect to an Administrative Court.<sup>19</sup> However, the Association, like the Task Force, urged the establishment of a court of original jurisdiction.

Senator Alexander Smith, of New Jersey, introduced a Senate Bill to create an administrative court on June 14, 1957.<sup>20</sup> The bill, he noted, was introduced "by request" of former President Hoover, and "in order that the bill might be considered by the appropriate committee."<sup>21</sup>

S. 2292 would seem to be more responsive to the resolution of the American Bar Association than to either the Task Force or the Hoover Commission recommendation. It would create an article III court of original jurisdiction, with status equivalent to a United States district

---

<sup>16</sup> *Id.* Recommendation No. 51, at 87.

<sup>17</sup> *Id.* at 88.

<sup>18</sup> TASK FORCE REPORT, *op. cit. supra* note 2, at 239.

<sup>19</sup> "Resolution 4. SPECIALIZED COURTS.—RESOLVED, That the American Bar Association recommends to the Congress the establishment, by amendment of Title 28 of the United States Code, of one or more courts of special jurisdiction within and as part of the judicial branch of the Government, such courts to have original jurisdiction in specified cases to ensure the tradition of independence in areas presently subject to administrative action equivalent to judicial action in courts of general jurisdiction, and their final orders and judgments to be subject to review by the Courts of Appeals; and that there be transferred to divisions of a single such court or to several such courts:

- (a) Limited jurisdiction in the trade practice field with respect to certain powers now vested in the Federal Trade Commission and in certain other agencies.
- (b) The jurisdiction now vested in the National Labor Relations Board over the adjudication of representation and unfair labor practice cases.
- (c) Such other adjudicatory functions as the Congress may from time to time determine.

4.1 TAX COURT.—RESOLVED FURTHER, That the American Bar Association recommends to the Congress that the Tax Court of the United States be removed from the executive to the judicial branch of the Government as a court of original jurisdiction, and that this result be achieved by amendment of Title 28 of the United States Code."

SPECIAL COMMITTEE REPORT, *op. cit. supra* note 2, 5-6.

<sup>20</sup> S. 2292, 85th Cong., 1st Sess. (1957).

<sup>21</sup> 103 CONG. REC. 8155-8157 (1957).

court, and composed of a Tax Section, a Labor Section, and a Trade Section. The bill provides for twenty-five judges, who will be to some extent interchangeable between sections.<sup>22</sup> The jurisdiction of the sections accords with the recommendations of the Association, the Task Force, and the Hoover Commission. Section 110(a) of the bill confers on the court exclusive jurisdiction to hear proceedings, render judgments, and issue orders under section 11 of the Clayton Act.

S. 2292 was referred to the Committee on the Judiciary of the Senate. While views of interested parties have been solicited by the Chairman of the Committee, no hearings have been held or have been scheduled at this writing.

An administrative court is not an end in itself, but is rather a means to the end of complete separation of judicial functions from the administrative process. Even the report of the Task Force describes the administrative court as but a stage in a theoretical evolution of administrative law, bridging the gap between the commingled jurisdiction of administrative agencies and the pure jurisdiction of the general courts, to which, according to the Task Force hypothesis, all judicial functions must eventually flow.<sup>23</sup> Since the administrative court is a device to effect the objective of complete separation of regulatory functions, the history of administrative law, and of the continuing effort to restrain it, provide an almost indispensable context for consideration of the merits of the present proposals to establish an administrative court. Basic arguments for consigning to the courts the adjudicatory functions of regulatory agencies not only are reflected throughout that history, but many were ably argued before the 49th Congress at the time of the adoption of the Act to Regulate Commerce in 1887.

The Interstate Commerce Commission, the first independent federal regulatory commission, was created by the Congress as a deliberate, conscious departure from the established structure of the federal government. Yet Congress was not without guideposts. The device of a regulatory commission as such had already been tested in practice by many of the states<sup>24</sup> and in law by the Supreme Court in the Railroad Commission cases.<sup>25</sup> The Court therein recognized as consonant with the Constitution a regulatory scheme which involved creation of a

---

<sup>22</sup> Section 107(a) of the bill provides for the appointment and use of commissioners by the Administrative Court, whose duties would be strikingly similar to those of the hearing examiners now employed by regulatory agencies under the Administrative Procedure Act. This raises the interesting question: Is the proposed administrative court an administrative agency disguised as a court?

<sup>23</sup> TASK FORCE REPORT, *op. cit. supra* note 2, at 239-242.

<sup>24</sup> At the time of enactment of the Interstate Commerce Act, some twenty-five states had established railroad regulatory commissions. Fifteen states, generally in the eastern half of the United States, had "weak," or advisory commissions; the remaining ten, chiefly in the midwest, had so-called "strong" commissions.

<sup>25</sup> 116 U.S. 307 (1886).

regulatory commission, charged with the duty of supervision of the railroads. Further, the Congress had before it the experience of England and the British Railroad Commission.

The pressures which led to the enactment of the Act to Regulate Commerce in 1887 were generally those which had spawned state regulatory commissions. Uncontrolled rate practices of the railroads, resulting in overcharges, preference and discriminations were widespread, and the public demand for congressional action would not be denied.<sup>26</sup> Congress had given increasingly serious study to the problem for more than a decade prior to 1887. Earlier congressional studies were concerned primarily with excessive charges,<sup>27</sup> a problem abated by increased competition and improved service. By 1886, however, more pernicious abuses, involving discrimination among communities, shippers, connecting carriers, and classes of traffic, engaged the attention of the Congress, and in that year, a special committee, chaired by Senator Cullom, of Illinois, made a report to the Congress<sup>28</sup> which contemplated the direct entry of the federal government into the field of railroad regulation.

The final, irresistible impetus for prompt congressional action came in the same year. It came, however, from neither the public nor the Congress, but rather, from the Supreme Court. In the *Wabash* case,<sup>29</sup> the Court held that the right to regulate interstate commerce was exclusively a federal function, even as to that part of the transportation which lay wholly within the borders of a state and despite the then vacuum caused by federal inaction. The time for congressional temporizing had clearly passed.

The choice between a commission and a court was squarely put to the 49th Congress. The Senate bill, as passed, provided for the establishment of the Interstate Commerce Commission, a novel experiment in federal government.<sup>30</sup> The House bill, more radical in its remedies, was more conservative as to process. It declared certain practices illegal, but left the enforcement of the act to the traditional jurisdiction of established courts.

What were the arguments for the creation of a commission? First, the experience of the states and to some extent, that of the federal government, had demonstrated that the courts were not adequately equipped to perform regulatory functions and had been largely ineffective

---

<sup>26</sup> Sen. Sherman, debating the conference report on the Act to Regulate Commerce, said: ". . . there is such a pressure of public opinion behind it that no committee of conference organized by Congress could possibly prevent the passage of the bill." 18 CONG. REC. 641 (1887).

<sup>27</sup> Windom Report, S. Rep. No. 307, 43rd Cong., 1st Sess. (1874).

<sup>28</sup> S. Rep. No. 46, 49th Cong., 1st Sess. (1886).

<sup>29</sup> *Wabash Ry. v. Illinois*, 118 U.S. 557 (1886).

<sup>30</sup> Sen. Morgan, a vigorous opponent of the bill, viewed it with this alarm: "Senators around me tell me it is experimental." 18 CONG. REC. 656 (1887).

in dealing with railroad abuses.<sup>31</sup> Second, the commission would possess a greater degree of flexibility than would the courts.<sup>32</sup> Third, a commission would be less costly and less burdensome for the "plain citizen" in contest with the giant railroad corporation, and hence was expected to be more fair<sup>33</sup> and, finally, a commission would become expert in its field of jurisdiction. Implicit in these debates, and given express recognition by a later Congress,<sup>34</sup> was a basic tenet of the concept of an independent regulatory commission. That is, a commission is in fact an active agent of the Congress, to carry out congressional policies, in contrast to the traditional passive character of the courts. This has always been regarded as a significant point in considering the desirability of separating regulatory functions or the applicability of the separation of powers doctrine. The Attorney General's Committee on Administrative Procedure stated in its final report,

An administrative agency must serve a dual purpose in each case. It must decide the case correctly as between the litigants before it, and it must also decide the case correctly so as to serve the public interest which it is charged with protecting.<sup>35</sup>

Judge Prettyman, of the Court of Appeals for the District of Columbia Circuit, described this concept as the "forward looking function" by an administrative agency, which "differs markedly from a purely judicial or quasi-judicial determination of present or past rights."

---

<sup>31</sup> See 1 SHARFMAN, INTERSTATE COMMERCE COMMISSION 285-291 (1886). During the debates on the adoption of the conference report, Senator Morgan argued bitterly against the device of a commission. He enumerated the substantive provisions of the proposed law, contending that, in each instance, "Courts . . . can administer every remedy that is sought to be administered through this bill." 18 CONG. REC. 653 (1887). In response, Senator Cullom, who was in charge of the bill, pointedly reminded Senator Morgan of the latter's earlier remarks on the unchecked abuses of the railroads under court enforcement. *Id.* at 660.

<sup>32</sup> Congressman Hitt spoke in praise of the Senate bill: "There is a softening discretion allowed to the commissioners by the Cullom bill, and it is the better for it. . . How much better this is than to fix in advance by inflexible law the whole body of rules to govern the most complex business known to our civilization and the most extensive, involving the largest amount of property and the greatest number of individual interests in the whole world." 17 CONG. REC. 7290 (1886).

<sup>33</sup> Congressman Rowell urged the House to agree to the Senate provision establishing a commission: "The Senate bill gives us a practical remedy. It proposes a commission's court without expense to the individual, with ample powers to enforce its decisions, not in a single case but in all cases within the law." 17 CONG. REC. A 444 (1886). And Senator Sherman said the commission "provides a place where any plain citizen may apply for a remedy." 18 CONG. REC. 644 (1887).

<sup>34</sup> Transportation Act, 1920, 41 STAT. 456, 49 U.S.C. §141 (1952). See also Statement of National Transportation Policy, preceding Interstate Commerce Act (1940).

<sup>35</sup> REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941).

In his book, *The Independent Regulatory Commission*,<sup>36</sup> Professor Cushman suggests that there was no apprehension on the part of Congress of any delegation of judicial powers to the Interstate Commerce Commission, principally on the ground that the Congress carefully avoided affording any finality to commission action. On the other hand, the debates in both the House and the Senate on the adoption of the conference report show a keen awareness of and sensitivity to the commingling of legislative, judicial, and executive functions.<sup>37</sup> So strongly did Senator Morgan, of Alabama, feel about this specific issue, that he offered an amendment which presented at least one side of the issue squarely to the Senate. He proposed that the Commission be defined as an executive office, to exercise neither legislative nor judicial power. His amendment was rejected by the Senate.<sup>38</sup> There would seem to be little doubt that Congress was aware that, in setting up the Interstate Commerce Commission, it had consciously "blended the legislative, judicial, and executive functions."

Even if, as Professor Cushman suggests, the debates at the time of the adoption of the act of 1887 shed insufficient light on the troublesome question of the admixture of powers given the Interstate Commerce Commission, there was ample illumination in the debates and hearings culminating in the adoption of the Hepburn Act in 1906.<sup>39</sup> The first years of the Commission were plagued by defects in the basic legislation and by restrictive judicial interpretation. In the early

---

<sup>36</sup> CUSHMAN, *op. cit. supra* note 3, at 61.

<sup>37</sup> In the House, the colloquy between Congressmen Oates and Holman is in point.

"Mr. Oates: . . . is not properly a legislative enactment within the power of Congress, because it proposes to blend legislative, judicial and executive functions.

"Mr. Holman: Let me inquire of my friend whether Congress can not confer upon these Commissioners judicial power, and are not the powers to be exercised under this bill judicial rather than administrative?

"Mr. Oates: That is exactly what I maintain—that the power conferred is judicial . . . .

" . . . .

" . . . . That is the very reason it is obnoxious to the constitutional objection (sic)—that it does embrace both legislative and judicial power, which can not be blended, because the powers of the Government are distributed, by the Constitution, among three distinct bodies of magistracy . . . ." 18 CONG. REC. 849 (1887).

In the Senate, Senator Morgan debated the same issue: "I have opposed the power that is conferred upon this commission. It is a power that is derogatory of the divisions between legislative and judicial powers which have existed in this country and in Great Britain from time immemorial." And further: "It is a court, then . . . . Not merely is there the blending in this of the legislative and judicial functions in the hands of the same parties, but the executive function is also trampled upon." 18 CONG. REC. 655, 656 (1887).

<sup>38</sup> 17 CONG. REC. 4422 (1886).

<sup>39</sup> 34 STAT. 584 (1906), 49 U.S.C. §1 (1952).



days, reviewing courts, suspicious of the Commission, were inclined to consider cases *de novo* and frequently made factual conclusions of their own, at variance with the findings of the Commission.<sup>40</sup> The Hepburn Act broadened the powers of the Commission, set forth in greater detail its jurisdiction over carriers and their services, explicitly defined the rate making power of the Commission and, most important, provided procedural reforms which, "as subsequently interpreted by the courts, rendered the determinations of the Commission, if constitutionally valid and not without the scope of its authority, effective and final."<sup>41</sup> The shape of these amendments, with implications of procedural and appellate reform, gave rise to renewed efforts to separate the judicial, legislative, and executive functions exercised by the Commission. For example, Congressman Sulzer, of New York, introduced legislation which would have (1) limited the jurisdiction of the Interstate Commerce Commission to rate matters, (2) transferred investigative and enforcement powers to an executive department (presumably the Department of Justice), and (3) transferred controversies, review, and the interpretation of basic statutes to the courts.<sup>42</sup> Again, Congress specifically rejected these attempts to separate the functions of the Interstate Commerce Commission.

The Mann-Elkins Act of 1910,<sup>43</sup> was primarily significant at the time of its passage for the establishment of the Commerce Court. The experience of the Commerce Court is signally pertinent to the consideration of the proposed Administrative Court, particularly as it bears on the efficacy of a specialized court to deal with regulatory problems. The idea of the specialized court, of either original or appellate jurisdiction, had been in the minds of members of Congress, the bench, and the bar for several years. As early as 1904, Congressman W. R. Hearst, of New York, introduced a bill to provide for a commerce court with extensive jurisdiction in the field of interstate commerce.<sup>44</sup> There were other advocates, but eventual congressional approval of a commerce court was a result of the direct influence of President Taft, a former judge of the circuit court of appeals. In a special message to Congress he urged that "reasons precisely analogous to those which induced the Congress to create a Court of Customs Appeals" called for the establishment of the Commerce Court.<sup>45</sup>

---

<sup>40</sup> CUSHMAN, *op. cit. supra* note 3, at 66.

<sup>41</sup> SHARFMAN, *op. cit. supra* note 31, at 45.

<sup>42</sup> 40 CONG. REC. 2086 (1906). Interstate Commerce Commissioner Prouty agreed in principle with Mr. Sulzer, recommending during the course of hearings before the Senate committee that the executive functions of the commission be transferred to either the Department of Commerce or the Department of Justice. Hearings before the Senate Committee on Interstate Commerce pursuant to S. Res. 288, 58th Cong., 3d Sess. (1905).

<sup>43</sup> 36 STAT. 539, 33 U.S.C. §743 (1952).

<sup>44</sup> 38 CONG. REC. 3158 (1904).

<sup>45</sup> 45 CONG. REC. 378, 379 (1910).

As finally established, the Commerce Court was the repository of the appellate jurisdiction then residing in the circuit courts. It is not clear that all the members of Congress regarded it as so limited. For example, Congressman Crumpacker, supporting the measure, stated, "This is a court of original jurisdiction upon a question of facts,"<sup>46</sup> and Senator Hughes, arguing against the proposal, contended that the bill conferred "distinctly legislative functions"<sup>47</sup> on the court.

The arguments advanced for the creation of the Commerce Court emphasized the lack of uniformity in decisions of the circuit courts, and the delay in reviewing Commission cases. It was widely believed that a specialized appellate court would benefit both the Commission and litigants before it.

The Commerce Court quickly found itself in difficulty. Despite the clear intent of the Congress, the court did not regard itself lacking in at least some degree of original jurisdiction. In one group of cases, for example, the Commission, after long investigation, had held certain switching charges to be unreasonable and had ordered them discontinued. The Commerce Court accepted the facts found by the Commission, but came to a contrary conclusion, arguing that, in the absence of factual dispute, the Commission conclusion was not binding on the court.<sup>48</sup> The Commerce Court thus became, to some extent, a court of original jurisdiction, a specialized court passing on the same questions as the Interstate Commerce Commission and frequently at variance with it. The annual report of the Interstate Commerce Commission for 1911 pointed out that in 20 of 27 Commission orders actually passed upon by the Commerce Court, preliminary injunctions or final decrees had been issued in favor of the railroads.<sup>49</sup> On the other hand, of 22 decisions of the Commerce Court from which appeals were taken to the Supreme Court, the Commerce Court was reversed in 13, modified in 2, and affirmed in 7.<sup>50</sup>

As Mr. Justice Frankfurter put it in his study of the federal judiciary system, the Commerce Court "was launched in unfavorable winds," and "early encountered a heavy sea."<sup>51</sup> Largely political factors had made its establishment precarious in the first instance. In the House, while the bill creating the court was in the committee of the whole, it was passed by the lone vote of the chairman.<sup>52</sup> The

---

<sup>46</sup> *Id.* at 5417.

<sup>47</sup> *Id.* at 5391.

<sup>48</sup> "We do not think that the Commission can, by an ultimate finding based upon the undisputed facts, preclude this court from reaching a conclusion of its own. . . ." *A.T. & S.F. Ry. v. I.C.C.*, 138 Fed. 229 (1911), *reversed*, 234 U.S. 294 (1915).

<sup>49</sup> *I.C.C. ANN. REP.* 53-54 (1911).

<sup>50</sup> Frankfurter, *A Study in the Federal Judiciary System*, 39 *HARV. L. REV.* 53, 606 (1926).

<sup>51</sup> *Id.* at 603.

<sup>52</sup> *Id.* at 602.

Commerce Court's frequent reversals of the Interstate Commerce Commission, followed by the Supreme Court's almost equally frequent refusal to sustain those reversals, lost it the confidence of Congress and the general public. And the Court's assumption of original jurisdiction raised anew the political furor which had accompanied its initial establishment. Finally, charges of misconduct on the part of one of the judges of the Commerce Court were followed by his impeachment and conviction.<sup>53</sup> While obviously irrelevant to the merits of the issue, the impeachment proceedings undoubtedly crystallized Congressional sentiment against the Court.

President Taft's veto of legislation which would have abolished the Commerce Court provided, as Mr. Justice Frankfurter put it, merely "a stay of execution," for the Congress was not to be dissuaded. A proposal to abolish the Court was incorporated in an annual appropriation bill and on October 22, 1913, the Commerce Court, after less than three years of life, ceased to exist. Expressing the prevailing view of both houses of the Congress, Senator Lewis stated on the floor of the Senate the reason for the Court's demise, "It was . . . the assumption of jurisdiction and usurpation on the part of the Court—a thing which the public mind was not willing to accept or endorse."<sup>54</sup>

Surely the unhappy experience of the Commerce Court was fresh in the minds of the Congress at the time of the adoption of the Federal Trade Commission Act and the Clayton Act.<sup>55</sup> Again, the Congress consciously created an agency of commingled functions and powers. Here again, too, the courts had not been able to deal adequately with the problems of unfair business practices. In creating the Federal Trade Commission, Congress went farther than it had in the initial establishment of the Interstate Commerce Commission, for in the new agency were married the investigative, prosecutive, and adjudicatory functions. The Clayton Act assigned certain enforcement functions in the transportation field to the Interstate Commerce Commission, but so far as the Commission was concerned, the passage of the Clayton Act was significant largely as a foreshadowing of greater powers to come, delegated to the Commission in 1920 in order to cope with problems of railroad corporate reorganization and financial transactions.

The Transportation Act of 1920 substantially broadened the administrative authority of the Interstate Commerce Commission and established its jurisdiction over all consolidations, mergers, unifications, and acquisitions of control of carriers then subject to the act.<sup>56</sup> The regulatory jurisdiction over such transactions delegated to the Commission in the 1920 act far exceeded the limited power delegated by section

---

<sup>53</sup> *Id.* at 612.

<sup>54</sup> 50 CONG. REC. 5413 (1913).

<sup>55</sup> 38 STAT. 717 (1914), 15 U.S.C. §41 (1952); 38 STAT. 730 (1914), 15 U.S.C. §§12, 44 (1952).

<sup>56</sup> 41 STAT. 480, 49 U.S.C. §5 (1952).

11 of the Clayton Act. Commission action under either grant, however, involves the same basic evidentiary area within a single regulated industry.

During the deliberation leading to the adoption of the Transportation Act of 1920, efforts were renewed to separate the functions of the Interstate Commerce Commission. Railroad witnesses before the House Committee<sup>57</sup> advocated the transfer of the expanded administrative responsibilities of the Commission to a transportation board, leaving the judicial functions with the Commission, in interesting contrast to the present administrative court proposals which would reverse the assignment. Nor was there confusion as to the judicial nature of the duties to be left with the Interstate Commerce Commission.<sup>58</sup> Again, Congress was not persuaded. The report of the House Committee on Interstate and Foreign Commerce, rejecting the idea of separate agencies, commented forcibly on the problems inherent in such a division of authority and responsibility in the regulatory field,<sup>59</sup> and the Congress refused to splinter the jurisdiction of the Interstate Commerce Commission.

Interest in the creation of a specialized court to assume the judicial functions of the regulatory agencies flagged, and it was not until 1929 that the proposal again reached Congress. In the 70th Congress Senator George Norris introduced a bill to establish an administrative court of appeals.<sup>60</sup> No action was taken on the bill. After a lapse of four years, Senator Logan, of Kentucky, introduced similar bills in the 73d, 74th, 75th, and 76th Congresses, and, while they had the support of the American Bar Association, no congressional action resulted.

In 1933, the American Bar Association appointed a Special Committee on Administrative Law, chaired by Mr. Louis G. Caldwell,<sup>61</sup> to study an appellate court proposal then before the Congress. In commenting, Mr. Caldwell accurately prophesied the direction of the future efforts of the American Bar Association: "I incline toward the view

---

<sup>57</sup> *Hearings before House Committee on Interstate and Foreign Commerce on H. R. 4378*, 66th Cong., 1st Sess. (1919).

<sup>58</sup> *Ibid.* Witness Johnson testified: "This, mark you, is a judicial body. It adjudicates citizens' rights. It . . . is relied upon to continue the calm and even-handed administration of justice."

<sup>59</sup> "The Commission has been aided in the performance of its judicial functions by reason of the intimate knowledge its members have acquired as to practical problems of railroad administration arising out of the administration of these several acts. In short, your committee fears that the creation of a transportation board, no matter how clearly its duties may be differentiated from those that are to be left to the Interstate Commerce Commission, will result in a division of authority and hence in a divided responsibility." H.R. Rep. No. 456, 66th Cong., 1st Sess. (1919).

<sup>60</sup> S. 5154, 70th Cong., 2nd Sess. (1929).

<sup>61</sup> Louis G. Caldwell, 1891-1951, member of bars of Illinois and District of Columbia, first general counsel of the Federal Radio Commission (predecessor of the Federal Communications Commission) and former chairman of the committees on Radio Law and on Communications of the American Bar Association.

that the ideal solution lies in the direction of a federal administrative court, with appropriate branches so as to take over or review the judicial functions of the multitudinous federal administrative tribunals."<sup>62</sup> The report of the committee for the following year recommended an administrative court of original jurisdiction, and in 1936, the American Bar Association approved "in principle" the establishment of a federal administrative court. In 1937, however, under the chairmanship of Dean Roscoe Pound, the special committee abandoned the court proposal, and in 1938, reported unfavorably on a similar bill.

But the issue was not lost sight of, and the argument for separation of powers was not abandoned. In 1937, the Committee on Administrative Management, appointed by President Roosevelt, recommended internal separation of adjudicating functions and personnel from those having to do with investigation or prosecution.<sup>63</sup>

In 1939, President Roosevelt directed the Attorney General to form a Committee on Administrative Procedure. Before the committee had completed its work, the Congress passed and sent to the President the Walter-Logan bill, sponsored by the American Bar Association.<sup>64</sup> This the President vetoed with a strongly-worded message,<sup>65</sup> and the veto was sustained.

The Attorney General's committee bent to its task. After a painstaking study of the organizations and procedures in each individual agency, the committee reported its findings and conclusions.<sup>66</sup> While expressly recognizing the problems arising from commingled functions, the majority of the committee still avoided the conclusion that complete separation was either desirable or necessary. The report contained recommendations designed rather to strengthen the administrative procedure, primarily, the internal separation of functions within the agency and the creation of independent trial examiners. The significance of the

---

<sup>62</sup> 58 A.B.A. REP. 203-204 (1933).

<sup>63</sup> "... the independent commission is obliged to carry to judicial functions under conditions which threaten the impartial performance of that judicial work. The discretionary work of the administrator is merged with that of the judge. Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from those subversive influences impossible.

"Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the commission, in the role of prosecutor, presented to itself." ADMINISTRATIVE MANAGEMENT IN THE UNITED STATES 36-37 (1937).

<sup>64</sup> S. 915 and H.R. 6324, 76th Cong., 3d Sess. (1940).

<sup>65</sup> H. Doc. 986, 76th Cong., 3d Sess. (1940).

<sup>66</sup> REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. Doc. No. 8, 77th Cong., 1st Sess. (1941).

report of the Attorney General's committee, so far as consideration of the administrative court is concerned, lies in its refusal to recommend the establishment of specialized courts. In fact, it specifically found that the administrative agency was the proper repository for the combination of powers entrusted to it.<sup>67</sup> The intervention of World War II delayed congressional attention to the recommendations of the Attorney General's committee. Immediately thereafter, however, those recommendations were legislatively treated in the Administrative Procedure Act.<sup>68</sup>

In the years following the passage of that act, Senator McCarran revived the proposal for an administrative court of review. But bar support was lacking, particularly in view of the opposition of the courts<sup>69</sup> and the proposal died in successive Congresses. And there the matter stood until the recommendation of the Task Force on Legal Services and Procedures of the second Hoover Commission.

The effort to separate the functions and powers of the administrative agencies, however, did not wane. In 1947, Congress amended the Labor Management Relations Act to separate completely the office of General Counsel from the remainder of the National Labor Relations Board. Some two years later, differences between the Board and its counsel became so pronounced that the President submitted a reorganization plan to transfer the functions of the counsel to the Chairman of the Board. Congress rejected the plan.<sup>70</sup> In 1952, Congress rewrote the Communications Act to provide a complete compartmentalization of the Federal Communications Commission. The experience of that Commission with "complete" internal separation, at least as reflected in the record of Commission reversals in the court of appeals on procedural grounds, has been something less than satisfactory.<sup>71</sup>

Summarizing the arguments for the creation of an administrative court as a device to separate the regulatory functions, primary reliance throughout the 70 years of administrative law seems either to be placed on or to stem from the doctrine of separation of powers. The report of the Task Force on Legal Services and Procedures raises an ancillary question; *i.e.*, whether the failure to separate completely adjudicatory and administrative functions may offend due process of law.<sup>72</sup> The

---

<sup>67</sup> *Id.* at 56.

<sup>68</sup> 60 STAT. 237 (1946), 5 U.S.C. §1001 (1952).

<sup>69</sup> REPORT OF THE PROCEEDINGS OF THE REGULAR ANNUAL MEETING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1949).

<sup>70</sup> S. Rep. No. 1516, 81st Cong., 2d Sess. (1950).

<sup>71</sup> During the consideration of cases in litigation before the Federal Communications Commission, commission members are practically isolated from effective assistance from either the commission's review staff or its general counsel. During the fiscal years 1947-1952, inclusive, the commission was reversed on appeal twice. During the fiscal years 1953-1957, inclusive, of 217 appeals from commission orders, the courts of appeals affirmed in 40 and reversed in 35. Of the latter, 21 reversals were on procedural grounds.

<sup>72</sup> TASK FORCE REPORT, *op. cit. supra* note 2, at 255.

report of the Special Committee on Legal Services and Procedures of the American Bar Association, after referring in passing to the doctrine of separation of functions, states that "the primary argument for the transfer of such adjudicatory functions from agencies to courts is that litigation and adjudication, as such, can be done better by judicial than by administrative bodies, with better assurance of considered action and a greater confidence on the part of the litigants that they are being impartially dealt with."<sup>73</sup> Finally, the Task Report urges the presently diffused enforcement of the Clayton Act as an additional reason for the establishment of the trade section of the administrative court. The argument runs to the effect that centralization of enforcement will tend to uniformity of decision,<sup>74</sup> and that economies may result.<sup>75</sup>

The Task Force report rationalizes the entire proposal with a neat theory of jurisdictional evolution. Under this theory, the combining of judicial and legislative functions in a newly established agency exploring a new area of regulation may be expedient. At this stage, internal separation of functions is adequate. Gradually, as the agency, the regulated area, and the law presumably become more settled, the judicial functions of the agency should be transferred to the courts. Where need for expertness remains, the transferral should be to a court of special jurisdiction, such as the proposed administrative court. A third step may come when the body of law developed by the specialized court "has become so well integrated in the judicial system" that the need for a specialized court disappears. At that point the judicial functions may be transferred to a court of general jurisdiction.

The devotion to the complete separation of powers doctrine as an argument for separating the functions of administrative agencies is not well founded. Despite the Supreme Court dictum in *Kilbourn v. Thompson*,<sup>76</sup> that it is "essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other . . .," the Court has never held such combination of powers to be unconstitutional.<sup>77</sup> Nevertheless, the proposition has been recited again and again in the history of the administrative process. Far from giving serious consideration to the argument, the Supreme Court has dismissed the argument of

---

<sup>73</sup> SPECIAL COMMITTEE REPORT, *op. cit. supra* note 2, at 44.

<sup>74</sup> A tendency not noted in the experience with the Commerce Court, *supra* pp. 388-90.

<sup>75</sup> TASK FORCE REPORT, *op. cit. supra* note 2, at 254.

<sup>76</sup> 103 U.S. 168, 191 (1881).

<sup>77</sup> Professor Kenneth C. Davis said in 1941: ". . . the day is long past when the Court would even give serious consideration to an argument to that effect." DAVIS, ADMINISTRATIVE LAW (1941).

separation of judicial powers almost perfunctorily.<sup>78</sup> The ability to separate successfully and completely the powers of administrative agencies seemingly depends at least initially on the ability to define those powers adequately. It is not yet clear, despite the specificity of the present administrative court proposal, that such a separation is practicable. Mr. Justice Holmes said,

It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires.<sup>79</sup>

There is a wide range of opinion as to the essential nature of the independent agency itself,<sup>80</sup> let alone the possibility of compartmentalizing its functions.

But even assuming that the transferral of judicial functions is practicable, the question of its desirability remains. Professor Nutting suggests that "adjudication may be so tied up with the whole regulatory process that to separate it would jeopardize the effectiveness of administration."<sup>81</sup> The Hoover Commission report on Legal Services and Procedures recommended that the Interstate Commerce Commission's reparation powers be transferred to the courts, but the function of awarding reparations, while in appearance an adjudication of rights between litigants, is in fact a pure by-product of the legislative rate making powers

---

<sup>78</sup> *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 400 (1940): "To hold that there was (an invalid delegation of judicial power) would turn back the clock on at least a half century of administrative law."

<sup>79</sup> Dissenting, in *Springer v. Government of Philippine Islands*, 277 U.S. 189, 211 (1928). See also Eastman, *The Place of the Independent Commission*, 12 CONSTR. REV. 95, 97 (1928): "The cataloging of the duties of an independent commission by tags representing the three traditional subdivisions of the Government is little more than an interesting mental exercise."

<sup>80</sup> CUSHMAN, *op. cit. supra* note 3, at 418, lists the following expert opinions on the nature of the Interstate Commerce Commission:

"judicial tribunal"—Commissioner Prouty, *Hearings before the Senate Committee on Interstate Commerce*, 65th Cong., 3d Sess. (1919).

"not a court. It is an administrative body."—Chairman Knapp, *Hearings before the House Committee on Interstate and Foreign Commerce*, 57th Cong., 1st Sess. (1902).

"arm of congress"—H. Rep. No. 472, 62d Cong., 2d Sess. (1912).

"executive body"—Commissioner Prouty, *Hearings before the Senate Committee on Interstate Commerce pursuant to S. Res. 288*, 58th Cong., 3d Sess. (1905).

"purely administrative body"—*I.C.C. v. Humboldt S.S. Co.*, 224 U.S. 474, 484 (1911).

"wholly legislative"—*United States v. Berwind-White Coal Mining Co.*, 274 U.S. 564, 583 (1927).

"entirely executive"—Senator Joseph B. Foraker, 40 CONG. REC. 3107 f. (1906).

<sup>81</sup> Nutting, *The Administrative Court, Symposium on Hoover Commission*, 30 N.Y.U.L. REV. 1384 (1955).



of the Interstate Commerce Commission, "an adjunct to carrying out the purposes of the Act."<sup>82</sup> Further, the Commission is constrained by the statement of the national transportation policy, preceding the Interstate Commerce Act, which Congress explicitly directed the Commission to consider in the construction of every section of the act. This raises the interesting problem as to whether the courts would be similarly instructed. In any event, precisely the same considerations of fact are the determinative factors in a rate making case or a reparations case and it is difficult to see how a separation of these two functions would promote uniformity of decision, particularly in light of the experience of the Commerce Court.<sup>83</sup>

Neither does there seem to be merit in the suggestion that due process would be better served by a complete separation of functions. Due process of law has never been a term of fixed and invariable content, nor is it questioned that Congress may prescribe rules and regulations for procedural safeguards.<sup>84</sup> This, of course, is precisely what Congress has done in the Administrative Procedure Act. The Supreme Court has held that the Administrative Procedure Act "created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights."<sup>85</sup> Even in the act, however, the Congress "did not go so far as to require a complete separation of investigating and prosecuting functions from adjudicatory functions."<sup>86</sup>

Further, the Supreme Court decided in the negative the precise issue of whether due process of law required a separation of functions in a deportation hearing, a proceeding which "involves issues basic to human liberty."<sup>87</sup> The Court noted that "this commingling (of the prosecutive and adjudicatory functions) if objectionable anywhere would seem to be particularly so in the deportation proceedings."<sup>88</sup> In treating the due process question, the court said:

Petitioner would have us hold that the presence of this relationship so strips the hearing of fairness and impartiality as to make the procedure violative of due process. The contention is without substance. . . .<sup>89</sup>

But due process of law does require "that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determination of fact, those determinations

---

<sup>82</sup> Arpaia, *The Independent Agency—A Necessary Instrument of Democratic Government*, 69 HARV. L. REV. 483, 500 (1956).

<sup>83</sup> See *supra* pp. 388-90.

<sup>84</sup> FCC v. W.J.R., 337 U.S. 265, 275-276 (1948).

<sup>85</sup> United States v. Morton Salt Co., 338 U.S. 632, 644 (1950).

<sup>86</sup> Wong Yang Sung v. McGrath, 339 U.S. 33, 46 (1950).

<sup>87</sup> *Id.* at 50.

<sup>88</sup> *Id.* at 46.

<sup>89</sup> Marcello v. Bonds, 349 U.S. 302, 311 (1954).

must be shown."<sup>90</sup> Again, Congress would seem to have met the adequacy of findings requirement in the Administrative Procedure Act,<sup>91</sup> and the proponents of the administrative court do not contend that there is inadequate court review of administrative decisions. Professor Davis suggests that the Administrative Procedure Act is a more promising weapon than due process for compelling adequate findings, and, by implication, at least, compares the requirements of the act favorably with the practice of trial courts.<sup>92</sup>

The Bar Association Special Committee alleges a lack of confidence on the part of litigants before a regulatory agency that they are being impartially dealt with. This is of course a subjective matter, difficult of analysis and difficult to assign weight. However, the context of the bar association report in which it appears is answered at least in part by the Administrative Procedure Act requirement for substantive findings, which certainly meets the test of better assurance of considered action and impartial treatment.<sup>93</sup> And if the reference to impartiality of treatment implies bias on the part of members of independent agencies, it is at least arguable that life tenure on a regulatory body, whether specialized court or commission, would not automatically insure lack of bias, and that the fixed-term appointee may be under even greater practical compulsion by virtue of his term to deal impartially with litigants. Further, since the administrative agency serves as an agent of Congress to carry out express congressional policy, the charge of bias may be easily misapplied by disappointed litigants. Again, the charge of bias is largely one of subjective origin. So far as the Interstate Commerce Commission is concerned, the argument that the confidence of litigants before it would be bolstered by transferral of the adjudicatory functions to a specialized court has been directly contradicted by the chairman of the Special Committee on Administrative Law of the Association of Interstate Commerce Commission Practitioners at the 28th annual meeting of that body.<sup>94</sup>

There remains the argument that centralization of Clayton Act enforcement will end diffusion in that field and promote both uniformity of decision and economy of operation. The Interstate Commerce Commission's enforcement of the Clayton Act in its field of regulation is

---

<sup>90</sup> *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432 (1935).

<sup>91</sup> *Supra* note 68, §8(b). See also separate opinion of Mr. Justice Frankfurter in *Schaffer Transp. Co. v. United States*, 355 U.S. 83, 95 (1957).

<sup>92</sup> DAVIS, *op. cit.* *supra* note 77, at 550.

<sup>93</sup> *Supra* note 68, §8(b).

<sup>94</sup> Starr Thomas, Chairman of the Special Committee on Administrative Law of the Association of I.C.C. Practitioners, and Ashley Sellers, Chairman of the Special Committee on Legal Services and Procedures of the American Bar Association, both addressed the Annual Convention of the Association of I.C.C. Practitioners on May 15, 1957, on the subject of the American Bar Association Legislative Proposals respecting Legal Services and Procedures.

but a minor part of the Commission's broad jurisdiction over financial matters affecting carrier corporations. The same reasoning applicable to the separation of the reparations power applies with equal vigor here.<sup>95</sup> Further, diffusion in enforcement of the Clayton Act would seem to be precisely what Congress intended, and for good reason. There is no uniform antitrust policy encompassing all the various areas of regulation, nor could there be. The justification for subjecting an industry to more-or-less complete regulation is its public utility character, and the effectuation of antitrust policies toward a regulated industry necessarily must be consistent with the regulatory agency's basic jurisdiction over the industry.<sup>96</sup> In the transportation field, for example, Congress has decreed that antitrust policy must be accommodated with the expressed national transportation policy. A division of authority between the Interstate Commerce Commission and an administrative court would hardly be productive of uniform application of the law.

Whether economies would result is doubtful. Certainly, the concept of a court of special jurisdiction implies expertise.<sup>97</sup> The accumulation of an expert staff (the basic repository of agency expertise) would be a duplicating effort difficult to justify. The suggestion that the prosecutive agency, for example, the Interstate Commerce Commission, would supply the necessary expertness in making its case falls with the provision of the administrative court recommendations that only an agency with statutory authority for its principal legal officer will be permitted to appear before the court.<sup>98</sup> In all other instances, the Attorney General will represent the agency.

The theory that the administrative court is a step in the evolution of administrative law toward the courts of general jurisdiction is not an argument, but an explanation. If the substantive reasons for a transfer of jurisdiction are not persuasive, then there is no need for any explanation. In any event, this evolutionary theory would seem to be more tidy than tenable. The experience with courts as agents in regulatory matters has been generally unsatisfactory,<sup>99</sup> and there is a serious question whether the delegation of essentially administrative or regulatory functions to an administrative court might not be unconstitutional.<sup>100</sup> Further, the field of administrative law is expanding, rather than contracting. The discovery of new sources of energy, and the depletion of other natural resources will inevitably call for an increase in the areas of federal regulation. For example, the Atomic Energy Commission has begun to evolve as

---

<sup>95</sup> See *supra* p. 396.

<sup>96</sup> *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 91-97 (1952); *McLean Trucking Co. v. United States*, 321 U.S. 67, 79-88 (1943).

<sup>97</sup> Task Force Report, *op. cit. supra* note 2, at 242.

<sup>98</sup> See *supra* note 13.

<sup>99</sup> *SHARFMAN, op. cit. supra* note 31. See also *Far East Conference v. United States*, 342 U.S. 570, 574-575 (1951).

<sup>100</sup> *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464 (1930).

an independent regulatory agency in the decision sense. Within established agencies, as well, growing industry problems, with increasing or novel impact on the public interest, demand a retention of the flexibility of the administrative agency, not a restriction of administrative law into over-rigid patterns and conformities. While there is a certain charm of apparent logic to the theory of administrative law evolving into law of general application to be administered by courts, the fatal weakness of the theory lies in its complete disregard of the "forward looking function" of the administrative agency. While the controversies before it may well determine rights between private parties, the independent regulatory agency must be guided by the paramount public interest.

It has been suggested that the proposed administrative court is change for the sake of change. Professor Jaffe, while complimenting the American Bar Association on the vigilance of its concern of the administrative process, says it is "doubtful wisdom to reform an institution which is not felt to be unjust or inefficient simply because it does not conform with abstract principles."<sup>101</sup> But wisdom here has been clouded with ancient misgivings, and the distrust of many members of the bar of the administrative process is no less now than it was when, in 1887, the then president of the American Bar Association condemned the embryo Interstate Commerce Commission as unconstitutional.<sup>102</sup> The fact that the arguments for changing the administrative process are not supported by reason has not at all diminished aversion to the process per se. So far as its critics are concerned, administrative law will likely continue to stand with Tom Brown's Dr. Fell.<sup>103</sup>

---

<sup>101</sup> Jaffe, *Basic Issues: An Analysis*, 30 N.Y.U.L. REV. 1273, 1288 (1955).

<sup>102</sup> See statement of Senator Lewis, 51 CONG. REC. 12925 (1914).

<sup>103</sup> "I do not love thee, Doctor Fell.

The reason why I cannot tell;

But this alone I know full well,

I do not love thee, Doctor Fell."

TOM BROWN (1663-1704)